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IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

STATE OF HAWAII, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF OF *AMICUS CURIAE* NATIONAL CIS COUNCIL 119 IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The National CIS Council 119 is a labor organization that represents over 11,000 bargaining unit employees of the Department of Homeland Security's U.S. Citizenship and Immigration Services ("USCIS"). Council 119's constituents include men and women of the USCIS Refugee Officer Corps who serve our country by traveling to some of the most inhospitable places in the world where they interview and vet refugees seeking resettlement in the United States.

Amicus curiae has a special interest in this case because Executive Order No. 13780's suspension of the United States Refugee Admissions Program ("USRAP") and reduction in the number of refugees eligible to be admitted into the United States for Fiscal Year 2017 are based on the notion that USRAP lacks adequate controls to ensure that refugees seeking to enter the United States do not pose a threat to our national security. As the collective bargaining unit of federal government employees who are at the forefront of the refugee resettlement process, *amicus curiae*'s members have first-hand knowledge as to whether the procedures and protocols guiding the admission and resettlement process ensure that refugees admitted

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

into the United States do not pose a risk to our national security.

In providing the Court with an overview of USRAP's process for vetting refugees seeking resettlement in the United States, this brief relies upon information that is publicly available and that is not confidential, law enforcement sensitive, or classified. It represents the views of Council 119 on behalf of the bargaining unit. It does not represent the views of USCIS employees in their official capacities.

SUMMARY OF ARGUMENT

USRAP, a consortium of several federal agencies responsible for identifying and admitting refugees for resettlement into the United States, is a shining example of the longstanding American tradition of offering safe haven to those fleeing persecution because of their race, religion, nationality, political opinion, or membership in a particular social group. America has offered its protection to the world's most vulnerable since its inception, and has allowed nearly five million refugees to resettle on its land since World War II. Our Nation's assistance to displaced people throughout the world, particularly through the work of USRAP, allows our country to lead by example. Because of these efforts, the United States has been able to exercise leadership with respect to refugee resettlement—a matter of humanitarian concern and American strategic interests—by persuading other countries to do their fair share in addressing the worldwide refugee crisis.

In Executive Order No. 13780, titled "Executive Order Protecting The Nation From Foreign Terrorist Entry Into The United States," President Donald J. Trump suspended USRAP for 120 days and lowered the number of refugees that can be admitted into the country for Fiscal Year 2017 from 110,000 to 50,000. The President's stated reason for doing so, as plainly reflected in the Executive Order, is that the current procedures for screening refugees seeking resettlement in the United States are inadequate and need to be evaluated to ensure that refugees entering the country do not pose a national security threat.

Contrary to the premise of the Executive Order, the participants in USRAP already use robust and exhaustive procedures to ensure that refugees approved for resettlement in the United States do not pose a threat to our national security. USRAP has long been at the forefront of innovation, adapting its procedures to identify and address ever-changing risks, threats, and challenges. These protocols include thorough screening and vetting by numerous international and federal agencies: the United Nations High Commissioner for Refugees ("UNHCR"), the international organization mandated to assist refugees that refers most refugee applicants to USRAP; Resettlement Support Centers ("RSCs"), non-governmental and international organizations monitored and funded by the Department of State that are located in close proximity to refugee populations and that conduct pre-screening interviews to collect data and information about each applicant's identity, background, and claims of persecution; USCIS

Refugee Officers who decide whether to approve each applicant seeking resettlement in the United States; and various other federal departments and agencies, including the Department of Homeland Security, Department of State, Department of Defense, Federal Bureau of Investigation, Customs and Border Protection, and the National Counterterrorism Center. As a result, refugees are the most thoroughly vetted of all immigrant populations seeking entry to the United States.

Given the evolving nature of our national security concerns, the vetting procedures that USRAP participants follow are dynamic and constantly being refined. To perform its important mission at this cutting edge level, USRAP requires the support of the Administration and Congress, including financial resources and personnel. But the Executive Order's wholesale suspension of USRAP for 120 days and slashing of the number of refugees that can be admitted for Fiscal Year 2017 by more than half are wholly unwarranted given the already robust nature of the vetting process. These actions undermine USRAP's critical work and America's standing as a global leader.

ARGUMENT

I. THE RESETTLEMENT OF REFUGEES IN AMERICA IS IN FURTHERANCE OF OUR LONGSTANDING TRADITION OF OFFERING SAFE HAVEN TO PERSONS FLEEING PERSECUTION

A America Has Been a World Leader in Refugee Resettlement

The story of refugees in America is older than that of America itself, with the country's roots sprouting from the footsteps of Pilgrims onto a Massachusetts shore in November 1620.[2] Fleeing religious persecution in their native England and exiled to Holland, the Pilgrims journeyed across the Atlantic to make their permanent home in what would become the United States.[3] Their arrival etched into the Nation's identity the promise that it would serve as a safe haven for the persecuted.

The mid-19th century brought millions more refugees to America's doorstep.[4] Between 1847 and 1851, an estimated two million Irish fled starvation and disease wrought by the Great Famine, with 840,000 passing through the port of New York and many more arriving by way of Canada.[5] During the

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[2] *See* William Bradford, *Of Plymouth Plantation* (Harold Paget ed. 2006).

[3] Jeremy Dupertuis Bangs, *Strangers and Pilgrims, Travellers and Sojourners, Leiden and the Foundations of Plymouth Plantation* vii, 7, 605, 614, 630 (2009).

[4] While U.S. policy during the 19th century did not draw a distinction between immigrants and refugees, historians have characterized groups whose emigration during this period was motivated by persecution, oppression, or natural disaster as refugees. *See* Philip A. Holman, *Refugee Resettlement in the United States, in Refugees in America in the 1990s: A Reference Handbook* 3, 5 (David W. Haines ed., 1996).

[5] Timothy J. Meagher, *The Columbia Guide to Irish American History* 77 (2005). *See generally* William A. Spray, et al., *Fleeing the Famine, North America and Irish Refugees, 1845–1851* (Margaret M. Mulrooney ed., 2003). Many historians refer

same period, German political refugees fleeing reactionary reprisals in the wake of the 1848 Revolution— known as the "Forty-Eighters"—came to America seeking freedom of thought and expression.[6]

Our Nation's treatment of refugees, however, is not unblemished, as demonstrated by United States policy towards Jewish refugees during World War II.[7] Although the United States accepted approximately 250,000 refugees fleeing Nazi persecution prior to the country's entry into World War II, it refused to accept more as Nazi Germany increased its atrocities.[8] American indifference to refugees fleeing German aggression is perhaps best reflected in the United States' denial of entry in 1939 to the *St. Louis*, an ocean liner carrying 907 German-Jewish refugees stranded off the coast of Miami.[9] The ship returned to Europe where many of its

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to these Irish migrants as refugees because their plight had roots in British colonial repression and conditions of serfdom. *See, e.g.*, Meagher, at 66-71 (discussing various historians' assignment of culpability for the famine's devastation to British colonial rule and noting "the paradox that Ireland exported food while its people starved.").

[6] *See generally* Adolf Eduard Zucker, *The Forty-Eighters: Political Refugees of the German Revolution of 1848* (1967).

[7] Richard Breitman & Alan M. Kraut, *American Refugee Policy and European Jewry, 1933–1945* 1–10 (1987).

[8] Holman, *supra* note 4, at 5 (citing Congressional Research Service 1991:556).

[9] The American Jewish Joint Distribution Committee, Minutes of the Meeting of the Executive Committee (June 5, 1939), http://archives.jdc.org/wp-content/uploads/2017/02/stlouis_minutesjune-5-1939.pdf.

occupants met their fate—254 would die in the Holocaust.[10] Nazi Germany found it "astounding" that countries that found it "incomprehensible why Germany did not wish to preserve in its population an element like the Jews . . . seem in no way particularly anxious to [welcome Jews] themselves, now that the opportunity offers."[11]

In many ways, our Nation's refugee policy since the Second World War has sought to rectify our wartime failures. Immediately after the war, the United States played a leading role in the formation and funding of international aid organizations such as the United Nations International Children's Emergency Fund and the World Food Programme, both of which provide support for refugees and displaced persons.[12]

After the war's end, in response to reports that Jewish survivors of the Holocaust were kept in poor conditions in Allied-occupied Germany, President Truman directed the issuance of 40,000 visas to

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[10] *Id.*

[11] Clarence K. Streit, *Germans Belittle Results*, N.Y. Times, July 13, 1938, at 12, https://timesmachine.nytimes.com/timesmachine/1938/07/13/issue.html; *see also No One Wants to Have Them: Fruitless Debates at the Jew-Conference in Evian*, Voelkischer Beobachter, (July 13, 1938), http://www.jewishvirtuallibrary.org/german-paper-ridicules-evian-conference.

[12] *See* Maggie Black, *The Children and the Nations: The Story of Unicef* 25–35 (1986); Bryan L. McDonald, *Food Power: The Rise and Fall of the Postwar American Food System* 143 (2017).

resettle the survivors in the United States.[13] Congress also took action by enacting the Displaced Persons Act of 1948—the first major refugee legislation in American history[14]—that allowed for the admission of 415,000 displaced persons by the end of 1952.[15]

American compassion toward refugees following the Second World War was not limited to Holocaust survivors. In 1953, Congress enacted the Refugee Relief Act of 1953, which, along with its amendments, authorized the admission of 214,000 refugees, including escapees from Communist-dominated countries.[16] In 1956, the United States permitted entry of over 30,000 refugees fleeing persecution in Hungary.[17] Soon after, the Refugee-Escapee Act of 1957 allowed for the resettlement of "refugee-escapees," defined as persons fleeing persecution in Communist or Middle Eastern

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[13] *See* Gil Loescher & John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door 1945–Present* 4–6 (1986).

[14] Congressional action surrounding refugees should not be confused with legislation regarding economic immigrants, which dates back to the Immigration Act of 1875 and the Chinese Exclusion Act of 1882. These laws limited entry of Chinese nationals into the United States. *See* Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882); Immigration Act (Page Law) of 1875, ch. 141, 18 Stat. 477.

[15] Displaced Persons Act of 1948, ch. 647, Pub. L. No. 80-774, 62 Stat. 1009; Holman, *supra* note 4, at 5.

[16] Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400; *see* Holman, *supra* note 4, at 5.

[17] Carl J. Bon Tempo, *Americans at the Gate: The United States and Refugees During the Cold War* 70–73 (2008).

countries.[18] In the following years, the United States continued to welcome millions of refugees from other parts of the world: Cubans after Fidel Castro's assumption of power in 1959;[19] Vietnamese, Laotians, and Cambodians after the fall of American-supported governments in the wake of the Vietnam War;[20] and those fleeing persecution from the Soviet Union, the Russian Republic, Eastern Europe, and Afghanistan.[21]

The United States also began to undertake international treaty obligations related to refugee resettlement.[22] In 1968, the United States ratified the 1967 Protocol Relating to the Status of Refugees, a treaty drafted by the UNHCR.[23] The 1967 Protocol removed the geographic and temporal limits to refugee resettlement contained in an earlier treaty, the 1951 Convention Relating to the Status of Refugees, which limited resettlement to European refugees displaced prior to 1951.[24] By ratifying the 1967 Protocol, the United States also became bound by all of the substantive provisions of the 1951

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[18] Refugee-Escapee Act of 1957, Pub. L. No. 85-316, 71 Stat. 639; *see* Holman, *supra* note 4, at 6.

[19] Bon Tempo, *supra* note 17, at 107–15.

[20] *Id.* at 148–151; Loescher & Scanlan, *supra* note 13, at 102–69.

[21] Mark Gibney, *Global Refugee Crisis* 91–92 (2d ed. 2010).

[22] *See id.* at 8–13.

[23] United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

[24] United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137.

Convention.[25] By ratifying the 1967 Protocol, the United States agreed not to, among other things: discriminate against refugees on the basis of their race, religion, or nationality; penalize refugees for their illegal entry or stay in the country; or return refugees against their will to territories where they fear threats to life or freedom.[26]

In 1980, Congress enacted legislation that sought to convert the existing *ad hoc* approach to refugee resettlement to a more permanent and standardized system for identifying, vetting, and resettling refugees.[27] The Refugee Act of 1980 declares:

> [I]t is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian

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[25] Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 Berkeley J. Int'l L. 1, 1 n.1 (1997).

[26] *Id.* at 2.

[27] Claire Felter & James McBride, *How Does the U.S. Refugee System Work?*, Council on Foreign Relations (Feb. 6, 2017), https://www.cfr.org/backgrounder/how-does-us-refugee-system-work.

> concern to the United States, and transitional assistance to refugees in the United States.[28]

The Act also aligned United States refugee law with our country's international treaty obligations, namely the 1951 Convention and the 1967 Protocol.[29] For instance, it adopted the definition of "refugee" contained in Article 1 the Convention[30] and also—consistent with Article 33 of the Convention—prohibited the removal of an alien to any country where "the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion."[31] Additionally, notwithstanding the fact that the 1951 Convention and the 1967 Protocol impose obligations on the United States only with respect to refugees that have set foot on American soil (referred to as "asylees"), the Act established the legal basis for USRAP, which focuses on resettlement of refugees located outside of the United States.[32]

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[28] Pub. L. 96–212, title I, §101, 94 Stat. 102 (1980).

[29] *See INS v. Stevic*, 467 U.S. 407, 425–26 (1984).

[30] *Compare* United Nations Convention Relating to the Status of Refugees, *supra* note 24, at art. 1A(2) *with* 8 U.S.C. § 1101(a)(42)(A).

[31] *Compare* United Nations Convention Relating to the Status of Refugees, *supra* note 24, at art. 33(1) *with* 8 U.S.C. § 1231(b)(3)(A).

[32] Tom K. Wong, *The Politics of Immigration: Partisanship, Demographic Change, and American National Identity* 52–53 (2017).

American leadership in refugee resettlement since World War II is perhaps best reflected in the sheer number of refugees absorbed into the United States since the war. In total, since World War II, the United States has granted entry to nearly five million refugees, representing well over 70 nationalities.[33]

But American leadership in refugee resettlement goes far beyond accepting refugees into the country. The United States has also been a major donor to the UNHCR, each year contributing several folds more than the next largest donor.[34] Leading by example, the United States has also persuaded other countries to do more. For instance, in 2016, the United States sponsored the Leaders' Summit on Refugees, an international conference designed "to increase global responsibility-sharing for refugees worldwide and thereby strengthen the international community's capacity to address mass displacement," particularly in relation to the civil war in the Syria.[35] At the summit, more than 50 countries pledged a combined $4.5 billion to assist refugees.[36]

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[33] David W. Haines, *Safe Haven?: A History of Refugees in America* 4 (2010).

[34] *See, e.g.*, UNHCR, *Donor Profiles*, Global Focus: UNHCR Operations Worldwide, http://reporting.unhcr.org/donor-profiles?y=2012 (last visited Sept. 6, 2017).

[35] UNHCR, *Summary Overview Document: Leaders' Summit on Refugees* (Nov. 10, 2016), http://www.unhcr.org/en-us/events/conferences/58526bb24/overview-leaders-summit-on-refugees.html.

[36] *Id.*

B. The World Is Experiencing an Unprecedented Level of Displacement

Today, the world is in the throes of a migration crisis that is unprecedented in its scale, surpassing even the aftermath of the Second World War.[37] In 2016, there were 65.6 million individuals who had been forcibly displaced from their homes—including over 22 million living outside their country of origin and 40 million who are internally displaced.[38] The ravages of the Syrian civil war have produced the largest number of new refugees—over 800,000 in 2016 alone.[39] These numbers do not include those who have lost their lives attempting to reach a safe haven.[40]

Now, perhaps more than ever, the world needs America to continue its longstanding tradition of offering protection, freedom, and opportunity to the vulnerable and persecuted.[41]

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[37] *See* UNHCR, *Global Trends: Forced Displacement in 2016* at 5 (June 19, 2017), http://www.unhcr.org/5943e8a34.

[38] *Id.* at 2–3, 7.

[39] *Id.* at 13.

[40] Dionne Searcey & Jaime Yaya Barry, *Why Migrants Keep Risking All on the 'Deadliest Route'*, N.Y. Times (June 22, 2017), https://nyti.ms/2tTCSXe.

[41] *See Examining the Syrian Humanitarian Crisis From the Ground (Part II) Before the Subcomm. on the Middle East and North Africa of the House Comm. on Foreign Affairs*, 114th Cong. 114-115 (2017) (written testimony of Leon Rodriguez, Director, U.S. Citizenship and Immigration Servs., Dep't of Homeland Security), http://docs.house.gov/meetings/FA/FA13/20151027/104123/HHRG-114-FA13-Transcript-

II. THE U.S. REFUGEE ADMISSIONS PROGRAM ADMINISTERS THE RESETTLEMENT PROCESS FOR REFUGEES SEEKING ADMISSION INTO THE UNITED STATES

USRAP is a multi-agency consortium established to effectuate the Refugee Act of 1980's objective "to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted."[42] USRAP is managed jointly by the Department of State through its Bureau of Population, Refugees, and Migration and the Department of Homeland Security through the USCIS's Refugee, Asylum and International Operations Directorate.[43] The Bureau

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20151027.pdf. ("[T]he United States has a proud and long-standing tradition of offering protection, freedom, and opportunity to refugees from around the world who live in fear of persecution and are often left to languish in difficult conditions of temporary asylum.").

[42] Refugee Act of 1980, Pub. L. No. 96–212, § 101(b), 94 Stat. 102.

[43] *See* U.S. Citizenship and Immigration Servs., *Hearing on "Refugee Admission FY 2017 and Refugee Security Screening" before the Senate Committee on the Judiciary, Subcommittee on Immigration and the National Interest on September 28, 2016 by USCIS Director Leon Rodriguez*, Official Website of the Department of Homeland Security, https://www.uscis.gov/tools/resources-congress/testimonies-and-speeches/hearing-refugee-admission-fy-2017-and-refugee-security-screening-senate-committee-judiciary-subcommittee-immigration-and-national-

is responsible for "overarching coordination and management," which includes working with the various participants in the refugee resettlement process that is discussed below.[44]

USRAP's work is guided by an annual determination made by the President for each fiscal year. The Refugee Act of 1980 provides that "the number of refugees who may be admitted . . . in any fiscal year . . . shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultation, is justified by humanitarian concerns or is otherwise in the national interest."[45] The statute defines "appropriate consultation" as "discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives."[46] For Fiscal Year 2017, President Barack Obama authorized the admission of up to 110,000 refugees into the United States.[47]

Section 207(a)(3) of the Immigration and Nationality Act ("INA") requires USRAP to allocate admissions among refugees "of special humanitarian concern to the United States in accordance with a determination made by the President after

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interest-september-28-2016-uscis-director-leon-rodriguez (last updated Jan. 26, 2017).

[44] *Id.*

[45] 8 U.S.C. § 1157(a)(2).

[46] *Id.* § 1157(e).

[47] 81 Fed. Reg. 70315 (Oct. 11, 2016).

appropriate consultation."[48] USRAP has set up three categories—referred to as "processing priorities"[49]—that delineate individuals and groups that are of "special humanitarian concern."[50] The three categories are: (i) Priority 1, which is for individuals "of any nationality, in any location, often with compelling protection needs, for whom resettlement appears the only durable long-term solution";[51] (ii) Priority 2, which is for specific groups of special concern "within certain nationalities, clans, or ethnics groups; sometimes in specified locations . . . whose members are in need of resettlement";[52] and (iii) Priority 3, which "affords USRAP access to members of designated nationalities who have immediate family members in the United States who

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[48] 8 U.S.C. § 1157(a)(3).

[49] "Although the access categories to the USRAP are referred to as 'processing priorities,' it is important to note that entering the program under a certain priority does not establish precedence in the order in which cases will be processed. Once cases are established as eligible for access under one of the three processing priorities, they all undergo the same processing steps." U.S. Dep't of State, U.S. Dep't of Homeland Security & U.S. Dep't of Health and Human Servs., *Proposed Refugee Admissions for Fiscal Year 2017: Report to the Congress* 7 (Sept. 15, 2016) [hereinafter *2017 Refugee Admissions Proposal*], https://www.state.gov/documents/organization/262168.pdf.

[50] *Id.* at 6.

[51] U.S. Gov't Accountability Office, GAO–17–706, *Refugees: Actions Needed by State Department and DHS to Further Strengthen Applicant Screening Process and Assess Fraud Risks* 72 (July 2017) [hereinafter *GAO Report*], https://www.gao.gov/assets/690/686310.pdf.

[52] *2017 Refugee Admissions Proposal*, *supra* note 49, at 8.

initially entered as refugees or were granted asylum."[53]

The application process for most refugees seeking resettlement in the United States begins with UNHCR, which, as discussed in more detail in Section III, *infra*, evaluates whether the applicant meets the requirements of the 1951 Convention and 1967 Protocol and performs other biographical checks on the applicant.[54] The application is then referred to the RSCs, which are located abroad within distinct geographic areas and operated by international and non-governmental organizations that communicate directly with applicants to process their applications, collect their information, and conduct in-person prescreening interviews.[55]

The process then moves to the adjudication stage, in which USCIS determines whether the applicant qualifies for refugee status and is eligible for admission and resettlement in the United States.[56] The USCIS process is administered by its Refugee Officer Corps—"a cadre of specially-trained USCIS officers who are dedicated to adjudicating applications for refugee status overseas"[57]—and

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[53] *Id.* at 12.

[54] *GAO Report*, *supra* note 51, at 14; *see* Section III.A., *infra*.

[55] *GAO Report*, *supra* note 51, at 2.

[56] *Id.* at 15–16.

[57] *Examining the Syrian Humanitarian Crisis From the Ground (Part II) Before the Subcomm. on the Middle East and North Africa of the House Comm. on Foreign Affairs*, 114th Cong. 114-115 (2017) (written testimony of Leon Rodriguez, Director, U.S. Citizenship and Immigration Servs., Dep't of Homeland

officers in the International Operations division.[58] These officers travel throughout the world on six- to eight-week "circuit rides," conducting in-person interviews and gathering fingerprints and other biometric information used to conduct additional security screening checks.[59] Each adjudicatory decision by these officers is reviewed by a USCIS supervisory officer.[60]

If an application is approved by USCIS, the applicant must undergo a medical screening and receive cultural orientation through the RSCs.[61] Prior to departure and upon arrival in the United States, each applicant is subject to additional vetting by U.S. Customs and Border Protection.[62] Upon admission to the United States, refugees are assisted by non-governmental resettlement agencies that provide them with essential services such as housing, furnishings, food, and clothing.[63]

For a majority of applicants, the entire process takes well over a year, and often two years, to

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Security), http://docs.house.gov/meetings/FA/FA13/20151027/104123/HHRG-114-FA13-Transcript-20151027.pdf.

[58] *GAO Report*, *supra* note 51, at 16.

[59] U.S. Citizenship and Immigration Servs., *Fact Sheet: Refugee Security Screening* (Dec. 3, 2015) [hereinafter *USCIS Fact Sheet*], https://www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%27l%20Ops/Refugee_Security_Screening_Fact_Sheet.pdf.

[60] *GAO Report*, *supra* note 51, at 17.

[61] *Id.*; *2017 Refugee Admissions Proposal*, *supra* note 49, at 18.

[62] *USCIS Fact Sheet*, *supra* note 59.

[63] *2017 Refugee Admissions Proposal*, *supra* note 49, at 19–20.

complete.[64] Each stage of the process is managed by highly trained individuals who care deeply about the objectives of United States refugee policy while safeguarding American national security.[65]

III. THE EXECUTIVE ORDER'S LIMITATIONS ON REFUGEES ARE UNWARRANTED BECAUSE USRAP PARTICIPANTS ALREADY USE ROBUST SECURITY MEASURES TO ENSURE AGAINST NATIONAL SECURITY RISKS

Refugees seeking entry into the United States undergo exhaustive vetting procedures specifically designed to identify and curtail national security risks. By the time a refugee is permitted to enter the United States, he or she has been screened by multiple agencies, including by thorough background checks, biometric tests, and in-person interviews. As a result, refugees entering the United States go through the most thorough vetting of all immigrants traveling to the country. The vetting process is dynamic, and USRAP participants constantly strive to refine it. But the Executive Order's approach—wholesale suspension of USRAP for 120 days and slashing the number of refugees that may be admitted into the United States for Fiscal Year 2017

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[64] *See GAO Report*, *supra* note 51, at 27–28.

[65] Letter from National Citizenship and Immigration Services Council 119 to Hon. Representative Zoe Lofgren, Ranking Member, House Subcommittee on Immigration and Border Security, USCIS employees Union Statement of Opposition to H.R. 2826 (June 27, 2017), http://local1924.org/wp-content/uploads/2014/06/HR-2826_AFGE119-Opposition-Statement.pdf.

by more than half—is unprecedented and unwarranted. This approach unnecessarily disrupts USRAP's process and mission.

A. UNHCR Pre-Screens Applicants for Security Risks Before Referring Them to USRAP

The vast majority of refugees seeking resettlement in the United States are referred to USRAP by UNHCR.[66] UNHCR maintains its own screening criteria and security protocols.[67] These processes aim to identify terrorism and other security-related concerns, prevent application fraud, and ensure that the applicant has a *bona fide* claim for refugee status and need for resettlement.

Consistent with the exclusion criteria of the 1951 Convention, UNCHR also excludes—and does not refer to USRAP—individuals who are believed to have committed war crimes, crimes against humanity, or acts contrary to the principles of the United Nations.[68] UNHCR gives special attention to an applicant's membership in a group or

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[66] U.S. Dep't of State, Bureau of Population, Refugees, and Migration, *U.S. Refugee Admissions Program FAQs* (Jan. 20, 2017), https://www.state.gov/j/prm/releases/factsheets/2017/266447.htm.

[67] UNHCR, *UNHCR Resettlement Handbook* (2011) [hereinafter "*UNHCR Handbook*"], http://www.unhcr.org/46f7c0ee2.html.

[68] *Id.* at § 3.5.1; *see* UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* (Sept. 4, 2003), http://www.refworld.org/docid/3f5857d24.html.

organization that commits or incites others to carry out violent crimes and to any evidence or allegation that the applicant has been associated with an act of terrorism.[69]

To effectuate these security checks, UNHCR submits each refugee applicant to a vetting process that begins with verification of the information provided by the applicant, including biographical details and the applicant's stated need for resettlement. UNHCR verifies the applicant's biographical data—including photographs of the applicant and any dependents and a complete description of the applicant's family composition—through its computerized *proGres* database.[70] After the biographical information is verified, UNHCR conducts a preliminary assessment of the individual's need for resettlement, which includes an evaluation of whether there are sufficient independent sources of information available to make a resettlement determination. During this process, UNHCR looks for any indicators of fraud in the applicant's case file, such as evidence of tampering.[71]

For each applicant, UNHCR's preliminary assessment culminates in a written report that is reviewed by a supervising UNHCR officer.[72] If UNHCR determines that the applicant is qualified

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[69] *UNHCR Handbook*, *supra* note 67, at §§ 3.6.4 and 3.6.5.

[70] *Id.* § 7.2, 7.2.1.

[71] *Id.* § 7.2.3.

[72] *Id.* § 3.8.1.

for resettlement, the applicant sits for an in-person status determination interview. UNHCR's interviewers prepare a written report summarizing the information provided by the applicant, assess the applicant's credibility, evaluate whether the applicant should be excluded based on the 1951 Convention's exclusionary criteria, and make a recommendation on whether the applicant should be resettled.[73] If the information provided by the applicant raises any red flags, the case is sent to UNHCR's Protection Unit for a full-fledged exclusion analysis.[74]

Upon satisfactory completion of these checks, UNHCR refers the application to a country offering resettlement, such as the United States. In pairing an applicant with a specific country, UNHCR considers whether the applicant has any familial links to the country, admission priorities and quotas set by the country, and the applicant's language abilities and cultural alignment.[75] In other words, an applicant cannot unilaterally elect to seek resettlement in the United States, although UNHCR will consider the applicant's expressed preferences.[76] If UNHCR determines that an applicant is a *bona fide* refugee who may be eligible for resettlement in the United States, it makes a referral to the Department of State.

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[73] *Id.* § 3.8.1.

[74] *Id.* § 7.2.2.

[75] *Id.* § 7.6.1.

[76] Some applicants may apply directly to USRAP for refugee status rather than going through UNHCR if they meet certain pre-determined criteria. *See GAO Report*, *supra* note 51, at 14.

B. RSCs Initiate Checks to Screen for National Security Concerns

Applicants referred to the Department of State by UNHCR first undergo prescreening and biographic checks at RSCs.[77] RSCs prepare a case file for each applicant and upload the applicant's information into the Worldwide Refugee Admissions Processing System, a Department of State database that tracks the status of all individual refugee applicants to USRAP.[78] RSCs then conduct an in-person interview with the applicant to record key information, including the applicant's persecution story and extended family information.[79] RSCs use this information to submit background security checks to the Department of State, the Department of Homeland Security, the Federal Bureau of Investigation, and other federal agencies.

In particular, Department of State standard operating procedures require RSCs to initiate three biographic security checks:

- A Department of State process in which the applicant's name and aliases are checked against the Consular Lookout and Support System, a database of various federal and other agency records containing information on prior visa applications, immigration law

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[77] *Id.*

[78] *Id.* at 4, 14.

[79] *Id.* at 14.

violations, and terrorism-related concerns.[80] In addition to information from the Department of State, this database contains information from, among others, the National Counterterrorism Center/Terrorist Screening Center, Interpol, the Drug Enforcement Administration, the Department of Health and Human Services, and various databases of the Federal Bureau of Investigation, such as the National Crime Information Center's Wanted Persons File, Immigration Violator File, Foreign Fugitive File, Violent Gang and Terrorist Organization File, and the Interstate Identification Index.[81]

- Security Advisory Opinions, which are biographic checks conducted by the Federal Bureau of Investigation and other intelligence entities for any applicant who is a member of a group or nationality designated by the United States government as requiring more thorough vetting.[82] These checks require clearance from multiple law enforcement and intelligence agencies before the applicant can continue the resettlement process.[83] The

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[80] *Id.* at 15.

[81] U.S. Citizenship and Immigration Servs., *Refugee Processing and Security Screening*, Official Website of the Dep't of Homeland Security, https://www.uscis.gov/refugeescreening (last updated Dec. 3, 2015).

[82] *GAO Report*, *supra* note 51, at 15.

[83] U.S. Committee for Refugees and Immigrants, *Security Screening of Refugees Admitted to the United States*, https://static1.squarespace.com/static/577d437bf5e231586a

Security Advisory Opinion process was implemented after September 11, 2001, to provide an additional security mechanism to screen individuals in certain higher-risk categories who are seeking to enter the United States.[84]

- Applicants within a certain age range are required to undergo an Interagency Check, in which the National Counterterrorism Center and other members of the intelligence community cross-check applicant data against intelligence and law enforcement databases and security holdings.[85] Syrian refugees and other categories of applicants are subject to additional review by the Department of Homeland Security as part of the pre-screening process.[86]

RSCs also implement antifraud measures overseen by the Department of State.[87] For example, the Department of State may require, where warranted, DNA testing for applications based on

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7055a9/t/57a24d23893fc0eb3919ad0f/1470254386734/USCRI+Security+Screening+Process+%285.16.16%29.pdf (last visited Sept. 6, 2017).

[84] U.S. Citizenship and Immigration Servs., *Refugee Processing and Security Screening*, *supra* note 81.

[85] *GAO Report*, *supra* note 51, at 15.

[86] *Id.* at 16.

[87] *See generally* U.S. Gov't Accountability Office, GAO–17–737, *Refugees: State and Its Partners Have Implemented Several Antifraud Measures but Could Further Reduce Staff Fraud Risks* (July 2017), http://www.gao.gov/assets/690/686323.pdf.

claimed parent and child biological relationships.[88] Some RSCs also conduct two prescreening interviews with each applicant using different interpreters to decrease the likelihood of collusion and to identify any false information provided by the applicant.[89]

Upon satisfactory completion of these checks, RSCs notify the Department of State and USCIS that the applicant is ready for further vetting and adjudication of their application.

C. USCIS Officers Vet Each Applicant to Identify National Security Risk

After clearance from RSCs, USCIS officers conduct individual, in-person interviews of each applicant at RSC locations. These officers have substantial training and access to robust tools in identifying national security risks. Applicants who are flagged as posing a national security risk are subject to additional vetting.

1. USCIS Officers Receive Substantial Training in Identifying National Security Risks

Officers in USCIS's Refugee Officer Corps—who interview a majority of refugee applicants—receive substantial training in identifying national security and fraud risks.[90] Specifically, in addition to

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[88] *GAO Report*, *supra* note 51, at 54.

[89] *Id.*

[90] *Id.* at 16.

the basic training required of all USCIS officers, the officers in the Refugee Officer Corps receive specialized training, including on grounds of inadmissibility, fraud detection and prevention, security protocols, interview techniques, credibility analysis, and country conditions research.[91] Officers who adjudicate applications from Iraq and Syria are further required to participate in an intensive Middle East Refugee Processing training, focusing on that region's history, country conditions, and particular security concerns.[92] New officers receive additional in-field training during which they observe experienced interviewers conduct interviews, receive individualized guidance and feedback, and discuss case-specific issues with trainers.[93] Finally, before departing for in-person interviews, these officers receive pre-departure briefings that provide additional information related to, among other things, groups being interviewed, location of interviews, and national security concerns.[94]

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[91] U.S. Citizenship and Immigration Servs., *Hearing on "Refugee Admissions, Fiscal Year 2016" before the Senate Committee on the Judiciary on October 1, 2015 by Chief of Refugee Affairs Division Barbara L Strack and Acting Associate Director Matthew D. Emrich*, Official Website of the Dep't of Homeland Security (Oct. 1, 2015), https://www.uscis.gov/tools/resources/hearing-refugee-admissions-fiscal-year-2016-senate-committee-judiciary-october-1-2015-chief-refugee-affairs-division-barbara-l-strack-and-acting-associate-director-matthew-d-emrich.

[92] *GAO Report*, *supra* note 51, at 41.

[93] *Id.* at 42.

[94] *Id.* at 41–42.

2. *USCIS Officers Thoroughly Evaluate National Security Risk*

USCIS officers use their training and an array of procedural tools to identify applicants who have engaged in persecution of others or pose a criminal or a national security concern.[95] Applicants posing a national security risk are rendered inadmissible by the INA, which sets out several security-related grounds of inadmissibility.[96] Moreover, throughout the USCIS adjudication process, USCIS officers make credibility determinations and look for indicators of these concerns, with emphasis placed on the INA's Terrorism-Related Inadmissibility Grounds ("TRIG").

Under TRIG, with certain exceptions, an applicant is inadmissible if he or she: has or is believed to have engaged in terrorist activity; is likely to engage in terrorist activity after entry; incited terrorist activity with intent to cause bodily harm or death; is a representative of current member of a terrorist organization; endorsed or espoused terrorist activity; received military-type training from a terrorist organization; or is the spouse or child of an alien who has engaged in terrorist activity within the last five years.[97] The definition of "terrorist activity" is "quite expansive[] such that the term can apply to persons and actions not commonly

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[95] 8 U.S.C. §§ 1101(a)(42), 1182(a)(2), (3).

[96] *See* 8 U.S.C. §§ 1182(a)(3)(A), (B), (F), 1227(a)(4)(A), (B).

[97] *See* 8 U.S.C. § 1182(a)(3)(B)(i).

thought of as terrorists and to actions not commonly thought of as terrorism."[98] As there is no exception under the law for "freedom fighters," most rebel groups are considered to be engaging in terrorist activity even if fighting against an authoritarian regime.[99]

USCIS officers employ various tests and procedures to identify whether an applicant may fall within the TRIG criteria or otherwise pose a national security concern. For example, prior to or during an interview, USRAP officials submit the applicant's

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[98] *See* U.S. Citizenship and Immigration Servs., *Terrorism-Related Inadmissibility Grounds (TRIG)*, Official Website of the Dep't of Homeland Security, https://www.uscis.gov/laws/terrorism-related-inadmissability-grounds/terrorism-related-inadmissibility-grounds-trig (last updated July 18, 2017). The INA defines "terrorist activity" as "any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involve," among other things, hijacking of any conveyance, the detaining or killing of another individual in order to compel a third person to do or abstain from doing any act, a violent attack on an internationally protected person, an assassination, the use of any weapon with intent to endanger the safety of another or to cause substantial damage to property. 8 U.S.C. § 1182§§ (a)(3)(B)(iii). A person can engage in terrorist activity by planning or executing a terrorist activity, soliciting others to do so, providing material support to a terrorist organization or member of a terrorist organization, and soliciting funds or recruiting members for a terrorist organization. *Id.* § 1182(a)(3)(B)(iv). "[M]aterial support" in this context includes actions such as providing a safe house, transportation, counterfeit documents, or funds to a terrorist organization or its members. *Id.* § 1182(a)(3)(B)(iv)(VI).

[99] U.S. Citizenship and Immigration Servs., *Terrorism-Related Inadmissibility Grounds (TRIG)*, *supra* note 98.

fingerprints for three biometric tests: (i) the Federal Bureau of Investigation 's Next Generation Identification check, which searches for any criminal history of the applicant and immigration data; (ii) the Department of Homeland Security's Automated Biometric Identification System, which identifies the applicant's travel and immigration history, immigration violations, and law enforcement and national security concerns; and (iii) the Department of Defense's Automated Biometric Identification System, which searches the Department's holdings in areas of conflict and other classified and unclassified government databases.[100] The information collected from these checks is utilized during the interviews or provides grounds for conducting additional interviews.[101]

USCIS has developed a number of additional resources to help interviewers identify and address national security concerns.[102] For example, USCIS maintains training lesson plans, guidance on terrorism-related issues, and country condition information that is accessible to interviewing officers overseas.[103] Further, in 2016, USCIS initiated a pilot program in which officers with expertise in national security—known as Security, Vetting, and Program Integrity officers—traveled with Refugee Officers to provide advice on adjudicating applications presenting national security and fraud

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[100] *USCIS Fact Sheet*, *supra* note 59, at 3–4.

[101] *GAO Report*, *supra* note 51, at 16.

[102] *Id.* at 45.

[103] *Id.*

concerns.[104] Due to the success of the pilot program, the expert officers will continue to assist Refugee Officers in cases presenting national security risks.[105]

If any national security concerns are raised during the USCIS adjudication process—through either information obtained from security or background checks, or personal interviews or testimony—the application is subjected to a more rigorous internal process known as the Controlled Application Review and Resolution Process.[106] This process ensures "that immigration benefits or services are not granted to individuals who pose a threat to national security and/or public safety, or who seek to defraud our immigration system."[107]

Moreover, Syrian applicants undergo additional enhanced review in which refugee adjudicators collaborate with USCIS's Refugee, Asylum and International Operations Directorate and the Fraud Detection and National Security Directorate.[108] The latter provides intelligence-driven support to adjudicators, including threat identification techniques, topics for questioning, and any relevant national security information.[109]

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[104] *Id.* at 46 n.75.

[105] *Id.* at 47.

[106] U.S. Citizenship and Immigration Servs., *Refugee Processing and Security Screening*, *supra* note 81.

[107] *Id.*

[108] *USCIS Fact Sheet*, *supra* note 59, at 5.

[109] *Id.*

After the in-person interview and any enhanced vetting, USCIS uses a refugee application assessment tool to determine if the applicant, among other things, (i) was appropriately granted access to USRAP, (ii) had past persecution or well-founded fear of persecution, (iii) is credible, (iv) is not a persecutor, and (v) is admissible into the United States (*e.g.*, whether the applicant poses national security or terrorism-related concerns).[110] Once the refugee officer reaches an admissibility determination, all completed case files are reviewed by a USCIS supervisor for legal sufficiency and to ensure that the interviewing officer appropriately considered security check results.[111]

D. Refugees Whose Applications Have Been Approved by USCIS Are Vetted Again Upon Travel to and Arrival in the United States

After USCIS approval, refugees who are scheduled for travel to the United States receive additional screening before entering the country. This screening is performed by U.S. Customs and Border Protection, which receives a manifest of inbound refugees eight days prior to their arrival.[112] This manifest allows the agency to perform additional vetting tests and background checks.[113]

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[110] *GAO Report*, *supra* note 51, at 38.

[111] *Id.* at 38–39.

[112] *USCIS Fact Sheet*, *supra* note 59, at 5

[113] *Id.*

Upon arrival in the United States, the agency inspects all refugees at one of seven domestic airports designated to receive refugees to make a final determination as to whether the refugee is finally admitted.[114]

CONCLUSION

Contrary to the premise of Executive Order No. 13780, refugees seeking resettlement in the United States are subjected to the government's most rigorous vetting procedures to ensure that they do not pose a threat to our national security. By allowing these refugees into the United States, our country honors its longstanding tradition of providing safe haven to the persecuted and leading the international community in the protection of refugees. The refugee-related provisions of Executive Order No. 13780 abandon that history and impede USRAP's humanitarian mission.

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[114] *GAO Report*, *supra* note 51, at 17–18.

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